



DECISION

Fair Work (Registered Organisations) Act 2009
s.158(1) RO Act—Rules of organisations

“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU)
(D2022/4)

DEPUTY PRESIDENT BEAUMONT

PERTH, 7 NOVEMBER 2024

Alteration of eligibility rules

Issue and outcome

[1] On 9 June 2022, the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (**AMWU**) applied to the Commission under s 158(1) of the *Fair Work (Registered Organisations) Act 2009* (**RO Act**) for the Commission to consent to an alteration of its eligibility rules.

[2] When the application was initially filed, the AMWU sought consent to alter its eligibility rules by inserting a new clause 1O into its Rules as follows:

1O. Without in any way limited or being limited by subrules 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I and 1N, the Union shall also consist of employees and independent contractors who are apprentices, trainees or whose work is otherwise subject to a training arrangement, howsoever described, to obtain a qualification or competency in or in connection with a trade, calling, occupation or position of persons eligible to be members of the Union.

[3] The AMWU submitted that at a high level, the effect of the proposed alteration was to provide unambiguous coverage for all employees and independent contractors who are apprentices, trainees or whose work is otherwise subject to a training arrangement.

[4] On 12 July 2022, the notice of receipt of the application was published in the Commonwealth of Australia Gazette. The period for objections closed on 16 August 2022. Objections were received from The Australian Workers’ Union (**AWU**), and from both the Construction and General Division and the Manufacturing Division of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), as it was known then. The matter was allocated to the Chambers of the then, Deputy President Gostencnik.

[5] During the period of 2022 to mid-2024, the proposed Rule change was negotiated between the parties. Multiple adjournments were granted to facilitate both negotiations and the AMWU’s internal authorisation process.

[6] By March 2024, following negotiations about the objections, the AMWU had proposed to file an amended application, which it anticipated would resolve most objections, except for

those pressed by the AWU. The AMWU therefore sought a further adjournment to allow discussions to occur with the AWU.

[7] However, by 17 April 2024, the AMWU had not yet filed an amended application for the Rule alteration and the unions had not had the opportunity to consider an amended application. The matter was therefore set down for a mention on 3 May 2024 and by 29 April 2024, the AMWU had filed an amended application for the alteration to an eligibility rule.

[8] A mention was held on 3 May 2024. Arising from the mention was an agreement that the AMWU would provide an undertaking to the unions, and that the unions were to notify the Commission, or the AMWU, should they wish to withdraw their objections. On 23 July 2024, the AMWU advised that it had reached an in-principle agreement with the unions in relation to the wording for the proposed Rule alteration and that it would obtain confirmation about the steps to take to finalise the matter.

[9] On 12 August 2024, the matter was allocated to my Chambers. On 13 August 2024, correspondence was sent to the parties requesting an update on the matter whilst noting that the matter would be listed for a status conference on 29 August 2024. On 28 August 2024, the AMWU again advised that it had reached an in-principle agreement regarding the wording of the proposed Rule alteration, and that the parties were finalising negotiations in respect of both an undertaking and a memorandum of understanding to resolve the matter.

[10] On 29 August 2024, the AMWU filed an amended application (for which leave was granted) (**Amended Application**). The AMWU now sought consent to alter its eligibility rules by inserting a new clause 1O as follows:

1O “Without in any way limiting or being limited by subrules 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I and 1N, the Union shall also consist of employees and independent contractors who are apprentices, trainees or whose work is otherwise subject to a training arrangement, howsoever described, to obtain an AQF (or successor regulated training scheme) qualification in connection with a trade, calling, occupation or position of persons eligible to be members of the Union.

Nothing in this rule 1O shall broaden the coverage of the Union to cover persons employed or engaged in a calling, occupation or position traditionally covered by the Australian Workers’ Union as at 1 July 2024.”

[11] A status conference was held on 29 August 2024 and a further status conference was scheduled for 7 October 2024. Prior to the status conference on 7 October 2024, the AWU confirmed that it had signed both the undertaking offered by the AMWU and a memorandum of understanding between it and the AMWU, in exchange for the AWU withdrawing its objection to the application. Similarly, at the conference on 7 October 2024, the Mining and Energy Union (**MEU**), Construction Division of the Construction, Forestry, Maritime Employees Union (**CFMEU**) and Manufacturing Division of the CFMEU, confirmed that they had signed the undertaking and withdrew their objections to the Amended Application.

[12] Following the status conference on 7 October 2024, the National Legal Officer of the Construction and General Division of the CFMEU informed the Commission of the following:

I refer to the above matter and the conference held just now.

As mentioned during the conference, Zach Smith signed the **attached** undertaking in his capacity as National Secretary of the CFMEU, as distinct from his capacity as Divisional Secretary of the CFMEU's Construction and General Division.

The Construction and General Division and its officers (including the Divisional Secretary) are subject to ch 11 pt 2A of the RO Act ("Administration of the Construction and General Division of the CFMEU and its branches") and the Scheme of Administration determined by the Attorney-General under s 323B.

However, the cross-divisional national office of the CFMEU and its officers, including Mr Smith as the National Secretary, are not.

More particularly, the National Secretary's powers and functions are not removed, or conferred upon the Administrator, by either the Scheme or the provisions of ch 11 pt 2A. Apart from cl 3(3) of the Scheme, which merely confirms that the position of National Secretary is not vacated, neither the Scheme nor ch 11 pt 2A makes any provision at all in relation to the National Secretary.

That being so, Mr Smith continues to possess the authority to execute the undertaking as the CFMEU's National Secretary, which authority is unaffected by the administration.

Further and in any event, please see the attached email from Michael McIver, Head of Legal for the Administrator of the Construction and General Division, confirming Mr Smith's continued authority to execute the undertaking in that capacity.

[13] Briefly stated, s 158(1) of the RO Act enables the Commission to consent to an alteration to the eligibility rules of an organisation, and s 158(2) of the RO Act enables the Commission to consent to a change or alteration in whole or part if it is satisfied that the alteration has been made under the rules of the organisation. Further, the AMWU is required to comply with Regulation 121 of the *Fair Work (Registered Organisations) Regulations 2009 (RO Regulations)*.

[14] On the basis of the material before the Commission, I am satisfied that:

- a. the proposed rule alteration has been made under the Rules of the AMWU (s 158(2) of the RO Act);
- b. there is material before me on which an opinion could be formed under s 158(4) of the RO Act that there is another organisation(s) to which the persons who would be eligible for membership because of the alteration, could more conveniently belong and would more effectively represent those members, it therefore appears that s 158(4) of the RO Act is engaged. However, the undertaking executed by the AWMU and each of the MEU, Construction Division of the CFMEU, the Manufacturing Division of the CFMEU and the AWU is appropriate to avoid demarcation disputes that might otherwise arise from an overlap between the eligibility rules of the AMWU and the eligibility rules of the other organisations as referred to (*see Attachment 1*);
- c. the proposed rule alteration would not contravene an agreement or understanding to which the organisation is a party and that deals with the organisation's right to represent under the RO Act and the Act the industrial interests of a particular class or group of persons (s 158(6) of the RO Act); and
- d. there is no relevant order under s 133 of the RO Act (s 158(7) of the RO Act); and

there is no discretionary reason not to consent to the rule change (s 158(8) of the RO Act).

[15] Further, I am satisfied that the AMWU has complied with the requirements of Regulation 121 of the RO Regulations.

[16] Accordingly, I exercise my discretion to consent to the AMWU's Amended Application to alter its eligibility rules.

[17] In accordance with s 158(9) of the RO Act, the Commission's consent to the AMWU's application will take effect on 7 November 2024.

[18] My detailed reasons follow.

Legislative scheme

[19] Section 158 of the RO Act governs a proposed alteration to the eligibility rules of an organisation registered under the RO Act. Section 158 provides:

158 Change of name or alteration of eligibility rules of organisation

(1) A change in the name of an organisation, or an alteration of the eligibility rules of an organisation, does not take effect unless:

- (a) in the case of a change in the name of the organisation—the FWC consents to the change under this section; or
- (b) in the case of an alteration of the eligibility rules of the organisation:
 - (i) the FWC consents to the alteration under this section; or
 - (ii) the General Manager consents to the alteration under section 158A.

(2) The FWC may consent to a change or alteration in whole or part, but must not consent unless the FWC is satisfied that the change or alteration has been made under the rules of the organisation.

(3) The FWC must not consent to a change in the name of an organisation unless the FWC is satisfied that the proposed new name of the organisation:

- (a) is not the same as the name of another organisation; and
- (b) is not so similar to the name of another organisation as to be likely to cause confusion.

(4) The FWC must not consent to an alteration of the eligibility rules of an organisation if, in relation to persons who would be eligible for membership because of the alteration, there is, in the opinion of the FWC, another organisation:

- (a) to which those persons could more conveniently belong; and
- (b) that would more effectively represent those members.

(5) However, subsection (4) does not apply if the FWC accepts an undertaking from the organisation seeking the alteration that the FWC considers appropriate to avoid demarcation disputes that might otherwise arise from an overlap between the eligibility rules of that organisation and the eligibility rules of the other organisation.

(6) The FWC may refuse to consent to an alteration of the eligibility rules of an organisation if satisfied that the alteration would contravene an agreement or understanding to which the

organisation is a party and that deals with the organisation's right to represent under this Act and the Fair Work Act the industrial interests of a particular class or group of persons.

(7) The FWC may also refuse to consent to an alteration of the eligibility rules of an organisation if it:

- (a) is satisfied that the alteration would change the effect of any order made by the FWC under section 133 about the right of the organisation to represent under this Act and the Fair Work Act the industrial interests of a particular class or group of employees; and
- (b) considers that such a change would give rise to a serious risk of a demarcation dispute which would prevent, obstruct or restrict the performance of work in an industry, or harm the business of an employer.

(8) Subsections (6) and (7) do not limit the grounds on which the FWC may refuse to consent to an alteration of the eligibility rules of an organisation.

(9) Where the FWC consents, under subsection (1), to a change or alteration, the change or alteration takes effect on:

- (a) where a date is specified in the consent—that date; or
- (b) in any other case—the day of the consent.

(10) This section does not apply to a change in the name, or an alteration of the eligibility rules, of an organisation that is:

- (a) determined by the FWC under subsection 163(7); or
- (b) proposed to be made for the purposes of an amalgamation under Part 2 of Chapter 3 or Division 4 of Part 7 of Chapter 11; or
- (c) proposed to be made for the purposes of a withdrawal from amalgamation under Part 3 of Chapter 3.

[20] The AMWU is also required to comply with Regulation 121 of the RO Regulations. Regulation 121 sets out as follows:

121 Application for consent to change of name or alteration of eligibility rules of an organisation (s 158(1))

(1) An organisation may apply to the FWC for the consent of the FWC under subsection 158(1) of the Act to:

- (a) change the name of the organisation; or
- (b) alter the eligibility rules of the organisation.

(2) An application under subregulation (1) must:

- (a) be in the form set out in the Procedural Rules or in a form otherwise approved by the President; and
- (b) set out:
 - (i) if the application is for consent to change the name of the organisation—the proposed name and the reason for the proposal; or
 - (ii) if the application is for consent to alter the eligibility rules of the organisation—the proposed alteration, the reason for the proposal and the effect of the proposal, in sufficient particularity to allow the proposal to be properly considered; and
- (c) contain a declaration:

- (i) that the change or alteration was made in accordance with the rules of the organisation; and
 - (ii) stating the action taken under those rules to make the change or alteration; and
 - (iii) verifying the facts stated in the application; and
 - (d) be lodged with the FWC; and
 - (e) if the application is for consent to alter the eligibility rules of the organisation—be lodged with a copy of the rules that are proposed to be altered.
- (3) If an application under subregulation (1) is not in accordance with this regulation, the General Manager must tell the applicant how the application or statement does not comply with the regulation.
- (4) An organisation that has a web site must publish on its web site a notice that it has lodged the application mentioned in subregulation (1).

Consideration

[21] In light of the consent position reached by the parties, I considered it appropriate to determine the matter on the papers.

[22] Turning first to consider whether the AMWU's proposed alteration to its eligibility rules have been made under the Rules of the organisation, the AMWU relies on the statutory declaration of Stephen Murphy, the National Secretary of the AMWU. Mr Murphy gave evidence that he was authorised to make the declaration on behalf of the AMWU.

[23] Mr Murphy declared that the alteration to the eligibility rules of the AMWU was made in accordance with the AMWU Rules. Mr Murphy explained that the actions taken under the Rules were as follows:

- a. on 24 July 2024, Fiona Googh, the Executive Assistant to the National Secretary of the AMWU, sent an email to all National Conference delegates seeking their endorsement by 2 August 2024, and enclosing a letter from Mr Murphy setting out the proposed alteration; and
- b. based on the response to the email ballot, as of 2 August 2024, a majority of National Conference delegates endorsed the alteration to the Rules.

[24] The power to make, alter, amend or rescind the AMWU Rules or to adopt new Rules, sits with the National Conference of the AMWU as its supreme governing body (see Rule 5A2(1)(h)). It therefore appears that the requirements of the AMWU's rule altering procedures have been met.

[25] The AMWU is required to comply with Regulation 121 of the RO Regulations. The AMWU's original application was signed by Abha Devasia, National Legal Coordinator of the AMWU, and the Amended Application by James Rabaud, National Operations Officer. The Amended Application set out the proposed alteration, the reason for the alteration and the effect of the alteration. The Amended Application contained a declaration stating the alteration of the eligibility rules were made in accordance with the Rules of the AMWU, stating the actions taken under the Rules to make the alteration to the eligibility rules and verifying the facts stated in the Amended Application. Reliance was placed, by the AMWU, on the Rules that were attached to the original application.

[26] It follows and as previously noted, I am satisfied that the AMWU has complied with the requirements of s 158(2) of the RO Act and Regulation 121 of the RO Regulations.

[27] Turning to the consideration of ss 158(4) and (5) of the RO Act. The AMWU acknowledged in its Amended Application that it was aware of other organisations who may more effectively represent members who are employees or independent contractors and are apprentices, trainees or whose work is otherwise subject to a training arrangement as described in the proposed Rule alteration. This submission appears uncontroversial. However, s 158(4) of the RO Act does not apply if the Commission accepts an undertaking from the organisation seeking the alteration, if the Commission considers the undertaking appropriate to avoid demarcation disputes that might otherwise arise from an overlap between the eligibility rules of that organisation and the eligibility rules of the other organisation. On this occasion, such undertaking has been provided and I consider that undertaking appropriate to address the concerns as otherwise referred to in s 158(5) of the RO Act.

[28] I do not consider there is any material before me which would provide a basis for refusing to consent to the respective eligibility rule alteration under ss 158(6) or (7), or otherwise. On this point, I note that whilst s 158(7) of the RO Act is not triggered in the circumstances, the AMWU accepts that the inclusion of rule 1O would change the effect of a decision made under s 505 of the Act by the Commission. In *“Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) v OS ACPM Pty Ltd T/A BHP Operations Services*¹ (**OS ACPM**), Commissioner Hunt held that the AMWU was not entitled to represent the industrial interests of BHP’s trainees at its FutureFit Academy and, accordingly, BHP was entitled to refuse entry of AMWU officials. Section 158(8) appears to cast broad discretion upon the Commission in determining whether or not to refuse consent for an eligibility rule alteration of an organisation.² Whilst not refusing consent may change the effect of OS ACPM, I do not consider that the change would give rise to a serious risk of a demarcation dispute that might otherwise impact upon the respondent party in OS ACPM, or, insofar as it is relevant, more broadly. This is particularly so given the undertaking entered into by the parties and the memorandum of understanding between the AMWU and the AWU. It follows that there is no discretionary reason not to consent to the alteration of the Rules.

Conclusion

[29] In all of the circumstances and for the reasons set out above, I exercise my discretion to consent to the AMWU’s application to alter its eligibility rules. It follows that new Rule 1O will be included in the AMWU’s eligibility rules and will read as set out at paragraph [10] of this decision.



DEPUTY PRESIDENT

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Attachment 1

UNDERTAKING

PARTIES

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union", known as the Australian Manufacturing Workers' Union of Level 3, 133 Parramatta Road, Granville NSW 2142 ("**AMWU**")

and

Mining and Energy Union (MEU)

and

Construction Division of the CFMEU

and

Manufacturing Division of CFMEU

and

The Australian Workers' Union (AWU)

BACKGROUND

1. The AMWU made an application to the FWC for an alteration of its eligibility rules to insert a new clause 1O gazetted on 12 July 2022 (**Application**). The application was allocated matter number D2022/4.
2. The Australian Workers' Union (**AWU**) filed notice of objection to the application (**AWU objection**).
3. The AWU is an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (**RO Act**).
4. The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) filed notices of objection to the application for consent (**CFMMEU objection**).
5. The CFMMEU has, in the time since the filing of the CFMMEU objection, disamalgamated. The Mining and Energy Union (**MEU**) is a registered organisation under the RO Act for the purposes of this Deed.
6. The Construction, Forestry and Maritime Employees Union (**CFMEU**), represented by the Manufacturing Division and the Construction and General Divisions, is a registered organisation under the RO Act for the purposes of this Deed.

7. On 29 April 2024, the AMWU filed an amended application to the initial application based on an agreement between the AMWU, AWU, MEU and the CFMEU to resolve the objections filed (**Amended Application**).
8. On 29 August 2024, the AMWU filed an amended proposed rule change to resolve the AWU Objection.
9. The AMWU, AWU, MEU and CFMEU have agreed to resolve the relevant objections and the application and other related matters on the basis that is set out in the paragraphs 13 to 14 of this document.
10. The parties acknowledge that there is no binding agreement between them unless the Fair Work Commission (**FWC**) consents to the rule change proposed by the AMWU in its amended application, based on the undertaking of the AMWU pursuant to section 158(5) of the RO Act.

TERMS

11. The MEU will withdraw the objection to the AMWU application in exchange for this undertaking, and the filing of the Amended Application.
12. The CFMEU will withdraw the objection to the AMWU application in exchange for this undertaking.
13. The AWU will withdraw its objection to the AMWU application in exchange for this undertaking and an MOU between the AMWU and the AWU.

UNDERTAKING

14. The AMWU undertakes that, with respect to workers within the scope of the new rule 10:
 1. The AMWU will at all times act in accordance with its stated objective in filing the Application, which is to permit the AMWU to recruit workers currently in a training arrangement who, at the end of that training arrangement, will be qualified in a trade of which the AMWU has express constitutional coverage.
 2. That neither the AMWU nor its officers, officials or agents will recruit workers who are already members or eligible to be members of the AWU, MEU or CFMEU unless agreed as between the AMWU and these unions.
 3. That neither the AMWU nor its officers, officials or agents will recruit workers on the basis of cheaper union dues.
 4. That neither the AMWU nor its officers, officials or agents will advise or encourage workers who are already members of the MEU, CFMEU or the AWU to resign from those unions.

15. The AMWU, MEU, CFMEU and AWU each confirm that there is no relevant demarcation, agreement or understanding that will affect the implementation of the above undertakings.

EFFECTIVE DATE

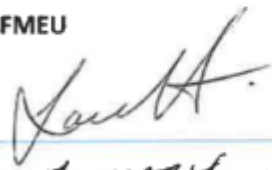
16. This undertaking shall be effective as of the date of the last signature below.

SIGNATURES

FOR AMWU


Name: Steve Murphy
Title: National Secretary
Date: 29 August 2024

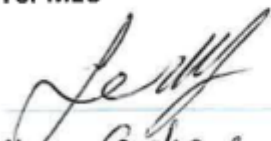
For CFMEU


Name: JANUARY SMITY.
Title: NATIONAL SECRETARY.
Date: 29/9/2024.

FOR AWU


Name: Paul Farrow
Title: National Secretary
Date: 24 September 2024

For MEU


Name: Graeme Kelly
Title: General Secretary
Date: 30 October 2024